

*United States Court of Appeals
for the Second Circuit*



**SUPPLEMENTAL
APPENDIX**

ORIGINAL

76-7081

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

CURTIS WARD,

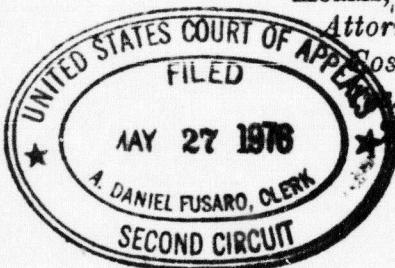
Plaintiff-Appellant,
B
P/S

—against—

THE CITY OF NEW YORK, CONSOLIDATED EDISON
OF NEW YORK, INC., JAMES MARTIN, JOCAR
CAB CORP., COSTELLO CONSTRUCTION COM-
PANY, INC. and INTERBORO SURFACE COMPANY,

Defendants-Appellees.

SUPPLEMENTAL APPENDIX



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EXCERPTS FROM TRIAL TESTIMONY

Ward—cross

(48) Q. A. No, I do not remember saying that. I looked for safety belts.

Q. And you didn't say anything to the cab driver about safety belts, then, is that more accurate? A. No, I did not. I did not.

Q. So when you said yesterday when Mr. Platt questioned you that you asked the cab driver where the safety belts were, that wouldn't be quite accurate then, would it? A. That was—that was not. I evidently misunderstood—

Q. You misunderstood Mr. Platt's— A. My counsel's question.

Q. You say after this bump that you experienced, you remained in the cab for some time, is that so, sir? A. I would say approximately 10 to 15 seconds, in that area.

Q. 10 to 15 seconds? A. Yes.

Q. And then after you got out of the cab, after the passage of time of 10 to 15 seconds, you tell us that you felt groggy and stunned.

Was that your testimony yesterday? A. Yes.

(49) Q. And after you got out of the cab, groggy and stunned, you were able to take notice that the left tire of the cab was up against the steel plates in the road? Were you able to do that although you were groggy and stunned? A. Yes.

Q. And in this groggy and stunned condition, you were able to come in here and describe the plates for us, is that so? A. I was groggy and stunned or shocked as I got out of the cab. When I walked around the cab, to the left side of the cab, and the cab driver then also remarked that he hit steel plates,—

Q. Yes. Confine your answer, if you will, with all due respects, sir, to your own observations. Will you do that? A. Yes, I could see the steel plates.

Q. All right.

Ward—cross

And you were groggy and stunned but you were able to ask the cab driver for his driver's license, is that correct? A. Correct.

Q. And you were groggy and stunned and—

The Court: Please don't keep repeating that.
(50) Save your summation.

Q. You were able to ask the cab driver for his hack license, is that so?

The Court: The question is did you ask him for it?

The Witness: Yes.

The Court: The argument is he was able to.

Mr. Byrne: I see.

The Court: Save it for summation.

Mr. Byrne: Yes.

Q. You did, in fact, after you alighted from the cab, go into the Montgomery Ward building, is that so? A. Yes, sir.

Q. And what floor did you proceed to go to after you went into the building? A. To the sixth floor.

Q. And did you then come down to the sixth floor and you went to the Brunswick Hospital? Isn't that so? A. I went to the French Polyclinic.

Q. French Polyclinic. I stand corrected.

And you stayed at the French Polyclinic until 11:00 a.m. in the morning, about two hours, two and a half hours after you went there, is that correct? A. Three and a half hours.

(51) Q. And after this three and a half hours, after you left the hospital, you took a plane flight to the state of Illinois about 12:00 o'clock in the afternoon, didn't you? A. That's right.

Ward—cross

Q. Just let me summarize and I promise you I won't be too long.

You saw Dr. McKeever, you tell us, about five times?

A. Yes.

Q. And that was the total number of times you saw him, isn't that correct? A. Yes. I would say that's approximately the total time.

Q. Would I be fair to you and accurate if I said that on each of those visits to Dr. McKeever, basically he gave you a check-up? A. Not a total check-up. He was checking, really, the reflexes of my neck and my reflexes and he also gave me a complete physical.

Q. So if I were to say he gave you a check-up, I wouldn't be doing justice to those five visits that you had with Dr. McKeever, would I? A. I don't believe I understand that question.

(52) Q. If I were to say that Dr. McKeever gave you a check-up on each visit, I wouldn't be doing justice to the five visits that he had with you?

The Court: He said he didn't understand the question. Reframe it.

Mr. Byrne: Yes.

The Court: I don't understand it either.

Q. Other than the check-up, what did the man do for you during the five times that you tell us you saw him?

A. Well, he mostly checked my neck for reflexes, he checked my blood pressure and to see—really to see if I—how much pain I was still having.

Q. Then you tell us you saw a Dr. Soper, is that right?

A. Yes, sir.

Q. You saw him twice. Did I hear that correctly?

A. Yes, sir.

Q. And what did he do on the two visits?

Ward—cross

You told us on the first visit he took the sutures out of your lip. A. No. The first visit he checked the sutures. The second visit, on March 5th, he took out the sutures.

Q. When you say he checked them, what did he do, (53) look at them? A. He looked at them.

Q. And the second visit he took them out. And then you saw a Dr. Howard, the dentist, on one occasion, isn't that so? A. Yes, on the same day.

Q. You mentioned Dr. Davis. A. Yes, sir.

Q. And he was the last man you saw, is that right? A. I saw him on February 28th.

Q. And he is the gentleman you told us you saw about how many times? How many times did you see him? A. Four times, and then I saw him on three additional visits where he comes into the therapeutic center and the Evanston Hospital and checks you while you are in there.

Q. So you saw him seven times in all, is that correct? A. Approximately, yes.

Q. Did he do anything else for you besides examine you and look at you during these seven visits? A. He gave me during either one or two visits an injection in my left shoulder. That's on his written report.

(54) Q. And on the other times he massaged your back in some fashion, did he? A. No. That was the physical therapy department where they have trained specialists that do that.

Q. You had seen Dr. Davis before this accident, too, didn't you? A. Yes, sir.

Q. As a matter of fact, Dr. Davis had been treating you for arthritis for some time before the accident, had he not sir? A. I've been seeing Dr. Davis for approximately four years, but not all for arthritis or for the neck.

Q. I see. You didn't mention— He operated on my heel, where I broke—chipped a heel.

Ward—cross

Q. He also treated you for your degenerative arthritic condition too, didn't he? A. A lower—a lower back condition.

Q. I see.

You have made mention during your testimony of the Evanston Hospital and of the North—you will have to help me—Northwhich Hospital? A. The Northwestern Memorial Hospital.

Q. Yes.

(55) Actually, you are not suggesting to these good people on the jury that you were confined to either of those hospitals, are you, sir? A. No, sir.

Q. Actually, you went to those hospitals as an outpatient just to see the doctors there, didn't you? A. Yes, sir.

Q. And the bills that you mentioned from those hospitals were not for confinement but for visits that you had with the doctors who were at the hospital, isn't that correct? A. For confinements?

Q. Sir? A. Do you say for—

Q. Yes. They were not for confinement, they were just for various and sundry visits that you had with the doctors at the hospital. A. For medical visits.

Q. You told us yesterday—and correct me, please, if I'm wrong—that you did not, in fact, lose any wages as a result of your accident or your four nights difficulty sleeping and your seven or eight days off from work, isn't that so? A. That's correct, sir.

* * *

(83) Q. Where did you go when you left the hospital, sir? A. To the airport.

Q. How did you get there? A. By automobile.

Q. I beg your pardon? A. By limousine.

Q. Did it have a seatbelt? A. Yes, sir.

Ward—cross

Q. And you say you bought your tickets and you went to Chicago? A. Chicago.

Q. What time did you get there? A. Two o'clock.

Q. In the afternoon? A. Yes, sir.

Q. And then you went to see a doctor there, did you not? A. Yes, sir.

Q. Did you tell us on direct examination that you were out of work two weeks? A. Yes, sir.

Q. Did you read the statement from your office that you were only out one week? (84) A. Yes, sir.

Q. Is the statement given by your office that you were out one week correct?

Mr. Platt: Objection, unless he offers the statement in evidence, your Honor.

The Court: Sustained.

Mr. Brass: May I have time to locate the paper from his office, sir?

(Pause.)

Q. Do you know Mr. R. W. Berry? A. Yes, sir.

Q. Can you tell us who he is? A. Personnel vice-president.

Q. I show you this photostatic copy of the letter.

Do you recognize this as one coming from him and from the office of Montgomery Ward (handing)? A. Yes, sir.

Q. Is that a report as to how long you were away from your work? A. The report, yes, says how long I was away from my work.

Q. And how long does it say you were away from your work?

* * *

Ward—cross

(56) Q. Are you aware of the fact that in a paper filed in this lawsuit known as a verified bill of particulars that you made claim for lost wages of \$380 a day for seven days? Were you aware of that fact, sir? A. I'm not aware of that fact.

Q. Let me show you your sworn verified bill of particulars which has been filed in this lawsuit by your attorney, and ask you if that refreshes your memory as to whether or not in this paper you made claim that you lost seven days earnings at \$380 per day (handing). A. The only explanation I could have for that is that we have a contingency employee's benefit account and if that could have been turned in by our personnel vice-president to Mr. Platt. I'm not familiar with that.

Q. Didn't you discuss your claim with Mr. Platt, your attorney, before you came into court and filed that claim and verified under oath the claims that you were making, sir?

Mr. Platt: May I see that bill of particulars that he is referring to?

The Court: I assume you have it.

Mr. Byrne: You may (handing).

Mr. Platt: I think—it was not verified by the plaintiff, your Honor. I think that should be put on (57) the record.

The Court: It is part of the record.

Mr. Platt: Yes. But it is not verified by the plaintiff, so I object to his question.

Mr. Byrne: Will you concede it is verified by the plaintiff's attorneys, Mr. Platt?

Mr. Platt: Yes, it was verified by plaintiff's attorneys.

Mr. Byrne: Will you concede it is part of the claims that you filed in this case, Mr. Platt?

The Court: I will take judicial notice of that.

Ward—cross

Q. Without belaboring the point, you did not, in fact, lose the lost earnings that you claim were lost in that paper, isn't that so? A. No, sir.

The Court: You don't make any claim now for lost wages?

The Witness: No, sir.

Q. Just one last question and thank you for your time: How long had you been troubled with this arthritic condition prior to February 27, 1974, the date of the accident, which is the subject of our discussion

* * *

Liebman—direct
Liebman—cross

(14) Q. Thank you.

And, Doctor, what was your fee for your examination of Mr. Ward? A. \$125.

Q. And was that fee paid to you? A. Yes.

Q. And was that the fair and reasonable value of the services which you rendered? A. Yes.

Mr. Carroll: The City of New York has no examination, your Honor.

Mr. Murphy: I have some.

Cross examination by Mr. Murphy:

Q. Doctor, the left zygomatic bone, is that commonly referred to as the cheekbone?

The Court: That is what he called it.

Mr. Murphy: Did he, your Honor?

A. By laymen, they call it the cheekbone. It is the large bone that goes from your nose towards your eye. It makes up the cheek.

Q. Thank you.

Doctor, did that bone completely heal? Was there a good recovery? (15) A. Well, I didn't see any subsequent X-rays of the zygomatic bone, but I assumed that the fracture did heal. But when I saw the patient, he brought X-rays only of his neck.

Q. Thank you, Doctor. A. I did not see X-rays of the zygomatic bone.

Cross examination by Mr. Byrne:

Q. Doctor, an abrasion is a scrape, isn't that so? A. Yes.

Liebman—cross

Q. A laceration is a little cut, isn't that correct, sir?

A. Yes. A laceration is a cut.

The Court: Is a cut, did you say?

The Witness: A cut.

The Court: It can be big or little?

The Witness: Yes.

Q. And this gentleman was not actually confined to the hospital from the hospital record you are reading, isn't that so? A. No. He was treated in the emergency room and left.

Q. Isn't it true he stayed there about two, two (16) and a half hours total, sir? A. Well, I can't—I can't read the time on this copy.

Usually there is a time when the patient comes in and leaves. It may be more visible on the initial copy. I don't know.

Q. Be that as it may, he didn't stay there overnight or anything of that nature? A. No, no.

Q. Doctor, you examined the man once, is that correct?

A. Yes.

Q. And how long did your examination which you tell us took place about nine months after the accident take, sir? How long did that take? A. Oh, I'd say the examination plus taking the history, about half an hour.

Q. And for that you charged \$125, Doctor? A. That included reviewing the X-rays, yes.

Q. I see.

Actually, would I be too unscientific if I call that fracture a non-displaced hairline fracture? A. Well, I only have the hospital record which I can—which describes it as a vertical fracture through (17) the outer aspect of the left zygomatic bone with no real displacement.

I have never seen X-rays of this bone, I can only go by this report.

Liebman—cross

Q. The hospital record says no displacement? A. No displacement.

Q. Osteo-arthritis, Doctor, isn't it a medical fact that all of us in some degree or another have arthritis from age 16 upwards? A. Commonly, most people develop arthritis in some part of their body as they get older. Some people develop very little but as one gets older they develop some arthritis.

I don't know about 16, but, you know, as you reach adulthood.

Q. As time takes its toll, this situation sometimes increases, isn't that so? A. It only gets worse, it never gets better.

Q. And you can have arthritis from sitting in front of an open window with a draft coming in as opposed to having an accident in a taxicab, can't you, sir? A. Sitting in front of an open window doesn't give you arthritis. Arthritis is the normal—the osteo-arthritis is the normal wear and tear of the body.

(18) Q. Right. Then you don't have to sustain this normal wear and tear of the body in an accident, do you? A. No.

Mr. Platt: I will object to the form of the question, your Honor.

The Court: I will allow it.

A. My answer is no.

Q. Incidentally—

The Court: You tell me this is a condition of gradual maturity, is that it?

The Witness: That's correct.

The Court: Whether or not there is a blow of any kind?

Liebman—cross

The Witness: That's correct.

The Court: Assuming you have that condition—incidentally, did this plaintiff have the condition before the accident?

The Witness: Obviously it was there before the accident.

The Court: Would this accident in any way aggravate it or make it worse, in your opinion?

The Witness: Well, it did. The patient stated that he did not have pain in his neck prior to the accident and the accident caused this condition to (19) be symptomatic, and it's a fact that osteoarthritis, which is asymptomatic which can cause no pain, can be aggravated by an accident.

The Court: Asymptomatic is not a word the jury goes around with in their pocket. What does it mean?

The Witness: It means painless. You have this condition and this is there and it is painless.

The Court: Then after a blow what happens

The Witness: After an accident, it can become aggravated so you can have pain in that area.

Q. You didn't see this man before the accident, did you?
A. I did not.

Q. So you don't know how bad this man's arthritis was before this accident? A. Obviously, that is true.

Q. Doctor, you mentioned a permanent cosmetic deformity, is that correct? A. Yes. There is a laceration on his left upper lip.

Q. Would you be good enough to show the jury with his Honor's kind permission, where this cosmetic permanent deformity is if he stands up? (20) A. He would have to stand up.

Liebman—cross

Mr. Byrne: With your Honor's permission.

The Court: Just let him point to Mr. Ward.

Mr. Byrne: Perhaps the jury can see this permanent cosmetic deformity.

Q. Will you point to that, sir?

(Witness indicates.)

Q. Before you testified, I saw you back in the courtroom for ten minutes talking to Mr. Platt. Is that so?

A. Yes.

Q. And I saw you out in the corridor talking to him for another ten minutes. Is that correct? A. That's correct.

Q. And you were discussing Mr. Ward's medical condition at that time?

The Court: I hope so.

A. Certainly.

Mr. Byrne: Thank you, sir.

The Court: That is great preparation for trial, ten minutes.

Cross examination by Mr. Brass:

Q. Doctor, there are two kinds of injuries, (21) objective and subjective, are there not? A. I don't think you mean injury, I think you mean—I think you mean physical complaints.

Q. Physical complaints. A. There are objective complaints, and there are subjective complaints.

Q. All right. And what is an objective complaint? A. An objective complaint—

Liebman—cross

Q. I didn't mean to be funny, Doctor, when I asked the question.

Mr. Platt: Your Honor, I—

Q. I am trying to let the jury know what we are talking about.

Mr. Platt: Your Honor, I object to Mr. Brass' statement.

The Court: Go ahead.

A. An objective complaint or finding is something that you see on a patient that is completely out of control of the patient.

In other words, if a patient has a laceration, a cut, or has a bruise, the doctor can see it and it's there, it's objective.

Subjective is a finding that is present and only the patient can complain of it.

(22) If a patient complains of a headache, obviously the examiner can't see the headache.

If a patient complains of pain, you have to rely on what the patient says. It is called subjective.

Q. So that when you touch him in any area and he said, "Ouch", or "This hurts," that is a subjective complaint?

A. That's correct.

Q. You are relying on the patient at that time with respect to his claim of being hurt at the time, am I right?

A. That's correct.

Q. Other than the scar under his nose, was there anything that you saw objectively with respect to his injuries?

A. No. The only objective finding on my examination was the scar on his lip; nothing else.

Liebman—cross

Q. Without knowing the condition of this arthritis before the accident, you cannot tell, can you, whether or not any symptomatic condition which came after the accident was caused by his condition or the accident without him telling you that it was the accident am I right about that?

A. That's correct. He would have to tell me (23) about the complaints of pain.

Q. You examined his cervical spine, referring to your report, Doctor, which revealed tenderness to palpation throughout.

What did you mean by tenderness through palpation?

A. As I pressed the area of his neck he complained of pain.

Q. He complained? A. That's correct.

Q. Did you find any condition that you saw which was the cause of his complaint? A. Well, no. This is a subjective finding. No.

Q. That's correct. That's what I want to know. A. No. I couldn't see it.

Q. There was a full range of motion with pain at the extreme of full extension and flexion.

What is a full range of motion, Doctor? A. It means that there was no limitation. He had complete motion.

Q. And in order for you to find pain at the extreme of full extension is what he tells you he's got, that you don't see, is that right? A. That's correct. I have to rely—

(24) Q. And you take the patient's word for that in making your report? A. Yes.

Mr. Brass: Just bear with me one moment, please.

(Pause.)

Mr. Brass: That's all.

Mr. Pellini: No questions.

Liebman—redirect

Re-direct examination by Mr. Platt:

Q. Doctor, cosmetic deformity, did you mean a scar? A.
Yes.

Q. Doctor, can you tell us whether or not a scar becomes dimmer or less obvious with the passing of time? A. As time progresses, the scar becomes less noticeable.

Initially the scar is red and as scar tissue grows into the scar it becomes white and hard.

Q. So, therefore, Doctor, could you tell us whether or not a scar of the type that you saw on Mr. Ward on December or November of 1974 be more apt or less apt to be noticeable than now, in December of 1975?

* * *

United States Court of Appeals
376-Affidavit of Service by Mail For the Second Circuit The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Curtis Ward

Plaintiff-Appellant
against

The City of New York, Consolidated Edison Company of New York Inc.,
James Martin, Jocar Cab Corp. Costello Construction Company Inc.,
and Interboro Surface Company,
Defendants-Appellants

State of New York, County of New York, ss.:

Raymond J. Braddick, being duly sworn deposes and says that he is
agent for Morris Duffy Ivone & Jensen Esqs. the attorney
for the above named Defendants-Appellee, Costello herein. That he is over
21 years of age, is not a party to the action and resides at
Levittown, New York

That on the 21 day of May, 1976, he served the within
Supplemental Appendix and Brief

upon the attorneys for the parties and at the addresses as specified below

1. Levy & Platt Esqs. 380 Lexington Avenue, New York, New York
2. W. Bernard Richland, Corp. Counsel, Municipal Building, New York, New York
3. Nicholas A. D'Onofrio Esq. 123 William Street, New York, New York
4. Gerberbaum, Garson & Goldberg Esqs. 26 Court Street, Brooklyn, New York
5. William

by depositing 2 true copies of each

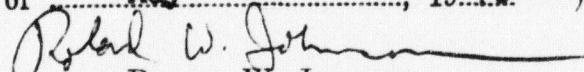
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

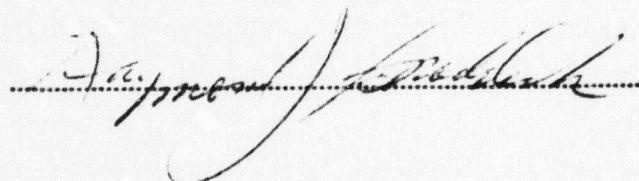
Sworn to before me, this 21st.

day of May, 1976


ROLAND W. JOHNSON,

Notary Public, State of New York
No. 4509705

Qualified in Delaware County
Commission Expires March 30, 1977



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